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# Supreme Court of the United States

No. 74-418

EDWIN DUBA,

*Petitioner,*

vs.

W. DON McINTYRE, DONALD LISSMAN, AND BERNARD ACH,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## ISSUES FOR REVIEW

Respondent does not accept the issues as set forth in petitioner's brief. The questions are more correctly stated in respondent Lissman's brief in the Court of Appeals, to-wit:

Whether

> "Arrest, imprisonment and execution of an order of attachment in aid and execution by a chief of police pursuant to a judicial directive is well within the authority of Nebraska statutes."

and whether

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"A chief of police who performs his official duties pursuant to law is entitled to judicial immunity from suit."

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent Donald Lissman takes exception to the citation by Petitioner of U. S. Constitution Amendment XIV, Sec. 1 in its brief for the reason that said section was neither cited nor relied upon in either his U. S. District Court or Eighth Circuit Court of Appeals brief.

## STATEMENT OF THE CASE

Respondent Donald Lissman does not accept petitioner's Statement of the Case. Respondent Lissman submits that the more correct Statement of the Case is as follows:

This action was brought by the petitioner, Edwin Duba, for damages arising out of an alleged false arrest, false imprisonment, unlawful attachment, unlawful execution and violation of his civil rights under 42 U. S. C. 1983. The case was filed in the United States District Court for the District of Nebraska, jurisdiction based on 28 U. S. C., Sec. 1343 and 42 U. S. C., Sec. 1983. Donald Lissman, among other respondents, filed a motion for summary judgment based on the fact that there was no genuine issue as to any material fact and that respondent Lissman was entitled to a judgment as a matter of law.

The Honorable Richard E. Robinson sustained respondent Lissman's motion for summary judgment on the basis of judicial immunity and the case was dismissed. The petitioner then processed his appeal pursuant to 28 U. S. C., Section 1292.

On the 11th day of September 1970 petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska, to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska, on the 28th, 29th, 30th and 31st days of August, 1970, in violation of an Ordinance of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September, 1970, respondent Ach, the duly appointed and acting City Attorney of Friend, Nebraska, executed an Affidavit for Bench Warrant, and delivered it to the respondent, W. Don McIntyre, the duly elected, qualified and acting Justice of the Peace for the District of Saline, Friend, Nebraska.

The respondent, W. Don McIntyre, on September 24, 1970, issued a Bench Warrant, and delivered it to the respondent, Donald Lissman, the qualified, appointed and acting Chief of Police of Friend, Nebraska. Also on September 24, 1970 the respondent McIntyre executed and delivered to the respondent Lissman an Order of Attachment in Aid and Execution.

On September 24, 1970, the respondent Donald Lissman arrested the petitioner, Edwin Duba, and placed him

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in jail for about one (1) hour, and attached certain swine in which the petitioner had an interest and said swine were sold at a public auction on September 25, 1970. The petitioner's fine was satisfied out of the proceeds of the sale and the excess proceeds were delivered to the rightful owner of the swine.

The petitioner brought this action against the respondent, Donald Lissman and the other respondents for their part in enforcing the fine levied against the petitioner on September 11, 1970.

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## ARGUMENT

### I.

**Those Courts of Appeal which have decided the issues presented in this case have decided them favorably to the respondent, Donald Lissman.**

One of the considerations governing review on certiorari is whether "a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter * * *."[1] In the case now before the Court respondent Lissman finds no conflicting decisions in the Courts of Appeal and petitioner cites none. Four Courts of Appeal have determined the immunity issue and have held uniformly in conformance with the Eighth Circuit Court of Appeals. The Circuit Court decisions are:

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1 Rules of the Supreme Court of the United States.

Fourth Circuit—*Steinpreis v. Shook*, 377 F. 2d 282 (4th Cir.), Cert. Denied 389 U. S. 1057 (1967).

Second Circuit—*Ravenscroft v. Casey*, 139 F. 2d 776 (2nd Cir. 1944), Cert. Denied 323 U. S. 745 (1944).

Sixth Circuit—*Allen v. Groap*, 283 F. 2d 692 (6th Cir. 1960).

Eighth Circuit—*Duba v. McIntyre, et al.*, — F. 2d — (March 15, 1974, No. 73-1724).

The Circuit Court in *Steinpreis v. Shook, supra*, in dismissing the suit against a county sheriff for wrongfully, fraudulently and maliciously obtaining judgments, and evicting the plaintiffs from a farm which they had leased, stated:

> "Likewise, the County Sheriff, in levying distraints, serving summonses, and conducting a Sheriff's sale, was merely carrying out the routine functions of his office. *These duties are mandatory.* * * * *All of the papers which the Sheriff processed were on standard forms and under oath. There is no allegation that the Sheriff made any improper or false return in any of these papers.*" At 283, 284. (Emphasis added.)

The Second and Sixth Circuits have held that authorities performing orders issuing from a Court are provided immunity when they do nothing other than perform those orders. *Ravenscroft v. Casey, supra*, and *Allen v. Groap, supra.*

Within the Circuits which have not decided the issue now before the Court, the District Courts considering the question have uniformly followed the Circuit Court decisions. The Federal District Court for the District of Nebraska, in *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962) stated as follows:

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> "An exception to the rule of judicial immunity exists which is founded on a distinction between the *excess* of jurisdiction and the *absence* of all jurisdictions * * * Where there is jurisdiction over the subject matter and the person there is immunity, and even though a judge acts in *excess* of his jurisdiction the immunity remains. * * * But where an act is done in the clear *absence* of all jurisdiction and this is known to the judge there is no immunity." (Citations omitted.)

Appellant presented no evidence to show that the City Ordinance or the Nebraska Statutes relied upon by respondents herein were defective or not in full force and effect. The Courts below determined, we think correctly, that there was sufficient jurisdiction over the subject matter so as to protect the respondent's actions under the Doctrine of Judicial Immunity.

The Federal District Court of Nebraska determined the issue of liability of police officers under 42 U. S. C. A., Section 1983, in *Rhodes v. Houston, supra,* and decided in favor of the police officer. In this case the plaintiff was tried in absentia for contempt of Court and was fined $2,500.00 and sentenced to nine months of hard labor in the Nebraska Penitentiary. The Clerk of the District Court, acting under color of her office and without a mittimus or other direction of the Court, issued an order of commitment directed to the County Sheriff to execute a sentence. Plaintiff subsequently filed suit against the District Judge, the Clerk of the Court, the prosecuting attorney, the Sheriff, and the Prison Warden. Judge Van Pelt, speaking for the Nebraska Court, dismissed the plaintiff's action against all defendants. Judge Van Pelt extensively discusses the immunity of judges, the immunity of prosecuting attorneys, the immunity of wardens and penal in-

stitution employees, and the immunity of law enforcement officers. With reference to the immunity of police officers, Judge Van Pelt stated:

> "Authorities performing orders issuing from a Court are provided immunity when they do nothing other than perform such orders. Citing *Ravenscroft v. Casey*, 138 F. 2d 776 (2nd Cir. 1944), Cert. Denied 323 U. S. 745 (1944). See also *Thompson v. Baker*, 133 F. Supp. 247 (Western District Arkansas, 1955); *Allen v. Groap*, 283 F. 2d 692 (6th Cir. 1960). Supra at 636.
>
> "(All actions of defendants Houston, Linch, and Knudtson (police officers) and defendant Macken (County Attorney) may be added, or allegedly performed on the authority of the commitment issued by the defendant Schuetz. On the strength of the authority set out above, it appears that these defendants are immune from the claim which plaintiff attempts to assert in his first cause of action.) (Parenthesis added.) Supra at 636."

The common law rule of judicial immunity has not been altered or abrogated by the passage of the Civil Rights Act, 42 U. S. C., Section 1981, et seq.; *Pierson v. Ray*, 386 U. S. 547, 87 S. Ct. 1213 (1967).

Other Federal Courts have held that a police officer executing a valid court order receives the same immunity which a judge acquires as a defense for his judicial actions. An example of this doctrine can be found in the case of *Goodwin v. Williams, et al.*, 293 F. Supp. 770 (1968). The action was filed under 42 U. S. C. A., Section 1983, for willful and malicious conspiracy to deny plaintiff of his constitutional rights. A trial court judge had issued a warrant for plaintiff's arrest, and had set the peace bond at $20,000.00. The Texas court dismissed the complaint with prejudice and held:

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> "It appears that the acts complained of as to the defendant Sharp were acts that he performed in his capacity as Sheriff of Deaf Smith County, Texas, and in the performance of his duty under the orders of the County Judge of that County. *The defendant Sharp as Sheriff was not only acting officially as Sheriff, but he was in effect an instrumentality of the County Court in carrying out the judicial functions and orders of that County Court.*" (Emphasis added.)
>
> "The County Judge has an immunity in this case that prevents any cause of action by the plaintiff here. Further, this immunity would, in this particular case, apply to the defendant Sharp, as Sheriff, because he was an arm of the County Court in carrying out the judicial functions of that Court as well as acting in his capacity as Sheriff. At 771-772."

The Supreme Court of the State of Nebraska has touched on the issue of the immunity of police officers and constables and have decided in favor of those ministerial officers. *Henning v. City of Hebron,* 186 Neb. 381, 183 N. W. 2d 756 (1971); *Atwood v. Atwater,* 43 Neb. 147, 61 N. W. 574 (1895); *Kelsey v. Klabunde,* 54 Neb. 760, 74 N. W. 1099 (1898).

Clearly the Circuit Court decisions support the decision of the Eighth Circuit Court of Appeals in the instant case. Respondent Lissman respectfully submits therefore that a review by this Court is unnecessary to resolve a conflict between subordinate courts and jurisdictions.

## II.

**The decision of the Eighth Circuit Court of Appeals is correct and consistent with prior U. S. Supreme Court decisions on the issue presented.**

The United States Supreme Court, in *Pierson v. Ray, supra,* in discussing the immunity doctrine, stated with regard to the potential liability of the judges as follows:

> "We do not believe that this settled principle of law was abolished by Section 1983 which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative records gives no clear indication that Congress meant to abolish wholesale all common law immunities. * * * Immunity of judges for acts within the judicial rule is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

In discussing the liability of the policemen, the court said:

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment is also available to them in the action under Section 1983. At 557.
>
> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. At 555."

The *Pierson* case set forth the doctrine that trial court judges are absolutely immune from civil liabilities from any actions performed under their jurisdiction, and likewise any police officers performing their duties in good faith and with probable cause shall not be subject to any civil liability.

The only U. S. Supreme Court case cited by petitioner is *Scheuer v. Rhodes,* — U. S. —, 40 L. Ed. 90, 94 S. Ct. 1683 (Nos. 72-914 and 72-1318 decided April 17, 1974). In the *Scheuer* case, *supra,* the Federal District

Court and the Court of Appeals for the Third Circuit agreed that the suit in question in legal effect was one against the State of Ohio and therefore not maintainable under the 11th Amendment and alternatively, that the common law doctrine of executive immunity barred the complainant's action. The complaints were dismissed at the District Court level for lack of jurisdiction and no answers were apparently filed on behalf of the defendants.

This Court reversed the judgment of the Court of Appeals and remanded for further proceedings either by way of summary judgment or by trial on the merits.

The major distinction between the *Scheuer* case and the case at bar is that the latter involved motions for summary judgment based on the pleadings, the deposition and affidavits and a factual determination was made by the District Court and affirmed by the Eighth Circuit Court of Appeals.

The deficiency in the *Scheuer* case, i. e., lack of factual findings, is not present in the case at bar. The issue before the Supreme Court in *Scheuer* was not whether judicial immunity applied but whether the claimant should be entitled to offer evidence to support the claims. This Court determined that further proceedings either by way of summary judgment or by trial on the merits are required in the *Scheuer* case and should be judicially resolved.

Respondent Donald Lissman respectfully submits to the Court that the issue of immunity as to him was resolved by the Federal District Court for the District of Nebraska and by the Eighth Circuit Court of Appeals and

that this Court is not compelled to further review the matter.

The *Scheuer* case does provide, aside from the narrow issue presented to it, a rather exhaustive review of the law of immunity and cites with approval and quotes from its earlier decision rendered in *Pierson v. Ray, supra.*

## CONCLUSION

For the foregoing reasons, respondent Lissman respectfully requests that the Petition for Writ of Certiorari be denied in this case and that the decision of the United States Court of Appeals for the Eighth Circuit be allowed to stand.

Respectfully submitted,

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